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MINING IN THE NATIONAL FOREST: CONFLICTS AND CONFUSION

By
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B.S., Colorado State University, 1975

Presented in partial fulfillment of
the requirements for the degree of

Master of Science
UNIVERSITY OF MONTANA

1978

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CHAPTER I

INTRODUCTION

The United States Forest Service (hereinafter called "Forest Service") has been given difficult and conflicting tasks. While aware of the importance of mineral resources to our Nation's well being, the Forest Service is also cognizant of its responsibility to protect and manage the surface resources within the National Forest system.¹

On one hand, the mining law enacted in 1872² (hereinafter called "Mining Law") was silent regarding the relationship of mining to other values and interests on public lands. However, this was not inconsistent with the mood and policies held by the public of that era. A philosophy prevailed that public lands would be quickly disposed of for the purpose of promoting development and settlement of the West.³

On the other hand, awakening environmental concern which began in the 1960s, in addition to the "discovery" of the National Forests as a place to hike, camp, fish, and in other ways to enjoy, has resulted in continuously mounting friction between the mining industry and other users of these lands. The Forest Service, as the principal agency responsible for managing the National Forests, has attempted to resolve this growing conflict.⁴

There are three main objectives of this paper. The first is to analyze how Forest Service policies, particularly

its policies pertaining to "hard-rock"⁵ mining, have been shaped in recent years as a result of the new federal direction provided in the National Environmental Policy Act of 1969 (NEPA).⁶ The second objective is to demonstrate that the Forest Service's newly charted course is severely hampered because of the antiquated Mining Law of 1872. The final objective is to point out that there is considerable confusion as to the degree to which the Forest Service can regulate prospecting and mining activities on National Forest lands. Prior to achieving these objectives, overviews of the Mining Law and NEPA are first introduced.

FOOTNOTES

Chapter 1

- ¹ U.S. Forest Service, Mining in National Forests: Regulations to Protect Surface Resources, Current Information Report No. 14 (Washington D.C., January, 1975) p. 2.
- ² 30 U.S.C. (United States Code) § 22 et seq.
- ³ U.S. Congress, Senate, Revision of the Mining Law of 1872, S. Doc. 95-11, 95th Cong., 1st sess., 1977, p. 6.
- ⁴ U.S. Forest Service, Mining in National Forests, p. 5.
- ⁵ This term, as used in this paper, refers to those minerals, both metallic and non-metallic, included under the Mining Law of 1872.
- ⁶ 42 U.S.C. § 43 et seq.

CHAPTER II

THE MINING LAW OF 1872: AN OVERVIEW

Approximately one-third of the total acreage in the United States is managed by the federal government. Roughly 68 percent¹ of these 743.2 million acres are open to mining under the provisions of the Mining Law of 1872.² Almost all of these lands open to hard-rock mining consist of Natural Resource lands, administered by the Bureau of Land Management (BLM), Department of the Interior, and National Forest Lands, administered by the Forest Service, Department of Agriculture.³

Although the law is referred to as the Mining Law of 1872, it has undergone substantial changes during its more than 100 years of existence through judicial decisions, Congressional amendments, and federal agency regulations. One of the more important amendments to the Mining Law is the Multiple Surface Use Act of 1955.⁴ Section 4(b) of this Act provides that any mining claim located after July 23, 1955 is subject to the right of the United States government to manage and dispose of the surface resources, as long as the miner's use of the land is not restricted.

Over the years, the Mining Law has been amended to exclude from its jurisdiction specific minerals and all minerals from certain states.⁵ The Mineral Lands Leasing Act of 1920⁶ placed fossil fuels such as coal, oil, gas, and

oil shale under a leasing system. This Act requires an application prior to prospecting and a lease before extracting of these minerals. Low value minerals such as clay, sand, and gravel were exempted from the Mining Law by the Materials Sales Act of 1947.⁷ To remove common varieties of minerals requires that they be purchased at a fair market value.

The Mining Law, as it now stands, requires that a valuable mineral deposit be discovered prior to filing of a mining claim. The term "valuable" used in this context was first defined in Castle v. Womble⁸ in what has subsequently become known as the "prudent man" rule. The court defined a mineral deposit as being valuable only when "a man of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine."⁹ Resulting from a long series of court decisions, the Supreme Court, in United States v. Coleman,¹⁰ held that "marketability at a profit"¹¹ was also a prerequisite for a valuable mineral discovery, thus providing further refinement for what constitutes a valid mining claim.

Under the Mining Law, a person is free to go onto any public land that is open to him and drill or dig for minerals. If a valuable discovery is located, he may stake a claim, giving him exclusive rights to all hard-rock

minerals within its boundaries, as long as each claim meets the requirements established in the Mining Law. A miner may construct buildings or cut trees on his claim if they relate directly to his mining operation. There are no limits to the number of claims that may be obtained.¹²

There are four basic types of mining claims:

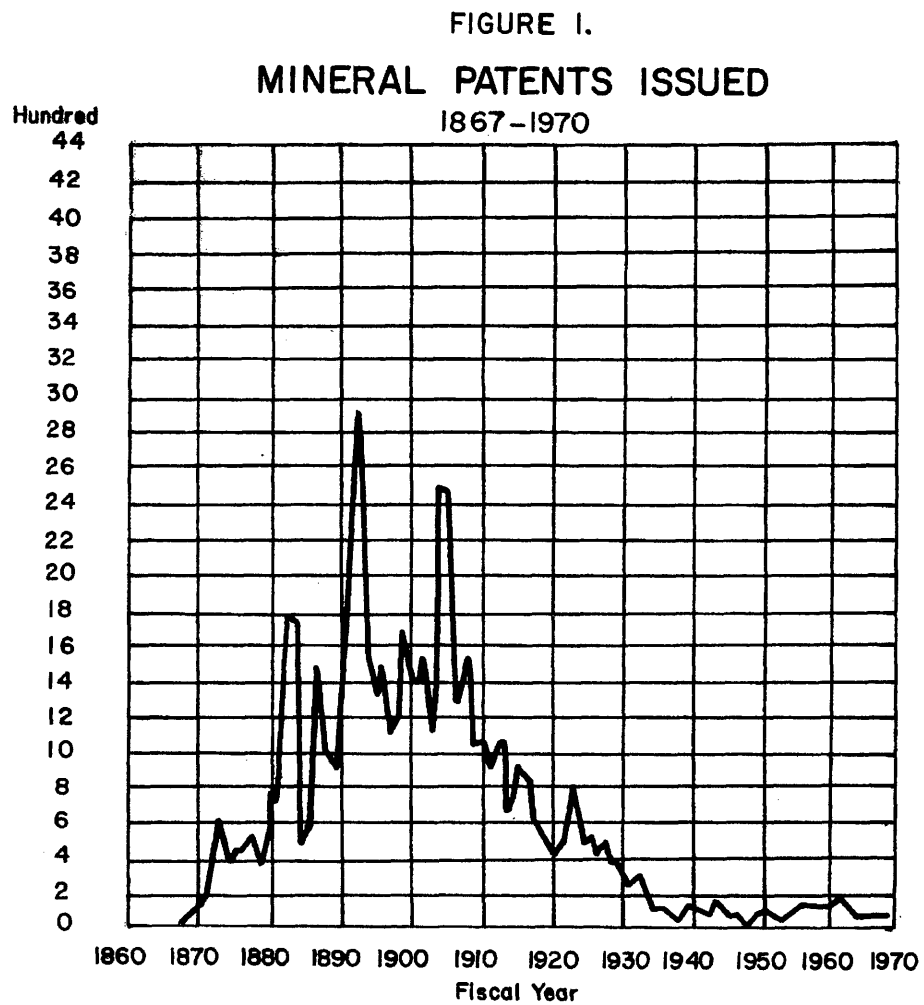
- 1) Lode claims include veins or lodes having defined boundaries, and rock-bearing minerals. A lode claim is 1,500 feet long and 300 feet wide on either side from the center of an ore body.
- 2) Placer claims include all other mineral-containing claims. Each placer claim is limited to 20 acres per claimant. An association of miners can stake a claim of 20 acres for each member of the association. However, the maximum claim size is 160 acres with an association of eight miners.
- 3) Mill site claims are restricted to five acre parcels per claim and must be non-mineral in nature.
- 4) Tunnel site claims are located on a piece of land where a miner wishes to build a tunnel leading into an ore body. A tunnel site claim is 3,000 feet wide on either side of the proposed tunnel. A miner may stake lode claims on any veins intersected by the tunnel giving the miner the right to prospect in an area 3,000 feet by 3,000 feet.¹³

Filing a claim is a simple process. Upon discovery of a valid mineral deposit, the miner provides a location notice to the local County Clerk's office and to either the State BLM Office, if the claim is on National Resource land, or to the District Ranger, if the claim is on National Forest land. In addition, the miner must clearly mark off each corner of the claim.¹⁴

The miner is required to spend a minimum of \$100 annually on improvements for each claim he holds to maintain its validity.¹⁵ He may obtain full ownership by filing an application with the Department of the Interior and paying \$250 for the first claim and \$75 for each additional and adjacent claim. If the patent is approved, an additional fee of \$2.50 per acre must be paid for each placer or mill site claim and \$5.00 per acre for each lode claim.¹⁶

In recent years, there has been a trend towards more stringent requirements for establishing the validity of a mining claim. In addition, there has been a growing conservatism by the Department of the Interior in its granting of mining patents. From 1867-1970, the United States granted roughly 64,500 mineral patents, disposing of three million acres of public land. This works out to an average of 625 patents and 28,000 acres taken from public ownership each year. However, from 1965-1970 only 200 patents were granted, disposing of just 28,000 acres of land, for

an average of 26 patents and 3,500 acres annually (Figure 1).¹⁷



SOURCE: Natural Resource Journal, vol. 16 (Albuquerque: New Mexico School of Law, 1976) p. 604

FOOTNOTES

Chapter II

- ¹ This figure includes lands that have been temporarily withdrawn in Alaska under the Alaskan Native Claims Act.
- ² Council on Environmental Quality, Hard Rock Mining on National Lands, by David Sheridan (Washington D.C.: U.S. Government Printing Office, 1977) p. 1.
- ³ Bureau of Land Management, Staking a Mining Claim on Federal Lands, Information Bulletin No. 2-78 (Washington, D.C.: U.S. Government Printing Office, 1978).
- ⁴ 30 U.S.C. § 601 et seq.
- ⁵ All minerals in Michigan, Minnesota, Wisconsin, Kansas, and Missouri have been excluded from the Mining Law.
- ⁶ 30 U.S.C. § 181 et seq.
- ⁷ 30 U.S.C. § 611.
- ⁸ 19 L.D. (Decisions of the Department of the Interior Relating to Public Lands) 455 (1894).
- ⁹ Ibid. at p. 457.
- ¹⁰ 390 U.S. 599 (1968).
- ¹¹ This phrase refers to minerals that can be sold at a profit under existing economic conditions.
- ¹² Bureau of Land Management, Staking a Mining Claim on Federal Lands.
- ¹³ Ibid.
- ¹⁴ Ibid.
- ¹⁵ Ibid.

16 Ibid.

17 Robert C. Anderson; "Federal Mineral Policy: The General Mining Law of 1872," Natural Resource Journal 16 (July 1976) 604.

CHAPTER III
THE NATIONAL ENVIRONMENTAL POLICY ACT: AN OVERVIEW

On January 1, 1970, President Nixon signed into law the National Environmental Policy Act (NEPA). This Act has been called a "landmark reform law"¹ and has been said to have a "revolutionary effect on projects affecting the environment."² Since its passage, 32 states have adopted similar legislation.³

There are four expressed purposes of NEPA:

- 1) To declare a national policy which will encourage productive and enjoyable harmony between man and his environment;
- 2) To promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man;
- 3) To enrich the understanding of the ecological systems and natural resources important to the nation; and
- 4) To establish a Council on Environmental Quality.

NEPA was born out of a Congressional recognition that, although citizens of the United States enjoy the highest standard of living in the world,

...as a nation, we have paid a price for our material well being. That price may be seen today in the declining quality of the American environment.

As the evidence of environmental decay mounts, it becomes clearer each day that the Nation cannot continue to pay the price for past abuse.⁴

NEPA was intended to bring fundamental reform to all levels of federal environmental decision making,⁵ thus, it

had the effect of raising environmental concerns on a par with technologic and economic considerations.⁶ However, the Act was not intended to replace any existing federal law; rather it required federal agencies to make environmental protection a part of their existing mandates.⁷

NEPA is divided into two parts: Title I and Title II. NEPA declares in Title I the new national policy concerning the environment and discusses goals to be worked towards and procedures to be followed by the federal government. In Title II, NEPA provides for the creation of the Council on Environmental Quality (CEQ) which is, among other things, responsible for providing an annual report on the progress of achieving the goals set forth in the Act.

Section 102(2)(C) of the National Environmental Policy Act forms the major tool for implementation. This section directs all federal agencies to:

...include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the environment, a detailed statement by the responsible official on

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in

the proposed action should it be implemented.⁸ In addition, Section 102(2)(C) requires that those persons responsible for the environmental impact statement "shall consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved."⁹

NEPA has given rise to more litigation in its short lifetime than any other environmental law. In fact, the courts have become the most important overseers of NEPA's implementation.¹⁰ There have been two landmark rulings establishing NEPA's application to federal agency decision making processes. In Calvert Cliff's Coordinating Committee v. Atomic Energy Commission,¹¹ the decision involved litigation over the licensing of a nuclear power plant by the Atomic Energy Commission on Chesapeake Bay in Maryland. The second court case involved a suit brought against the United States Army Corps of Engineers by the Environmental Defense Fund to stop construction of Gilliam Dam in Arkansas.¹² In both cases, the court held that NEPA created substantial rights and not mere procedural requirements. These cases established that NEPA is more than just a full disclosure law. It is also a tool to be used by federal agencies to help them arrive at rational decisions. In other words, agencies are not permitted to just mechanically prepare an Environmental Impact Statement to fulfill the obligations of

NEPA; rather, every federal agency must make NEPA a working part of its mandates and apply NEPA's principles to decisions affecting the environment.¹³

FOOTNOTES

Chapter III

- ¹ Joseph Sax, Defending the Environment: A Strategy for Citizen Action (New York: Knopf, 1971) p. 96.
- ² James L. Hildebrand, "Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research," Columbia Law Review 70 (April 1970) p. 674.
- ³ Robert W. Burchell and David Listokin, The Environmental Impact Handbook (New Brunswick: Rutgers University, 1975) p. 8.
- ⁴ 42 U.S.C. § 4331.
- ⁵ Frederick R. Anderson, "The National Environmental Policy Act: How it is Working: How it Should Work," Environmental Law Reporter (January 1974) p. 3.
- ⁶ Robert B. Ditton, "NEPA: Buckling Down," Environmental Impact Analysis: Philosophy & Methods, ed. Robert B. Ditton and Thomas I. Goodale (Green Bay: University of Wisconsin Press, 1972) p. 139.
- ⁷ Calvert Cliff's Coordinating Committee v. Atomic Energy Commission, 449 F. 2d 1109, 1 E.L.R. 20346 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972).
- ⁸ 42 U.S.C. § 4332 (C).
- ⁹ Ibid.
- ¹⁰ F. R. Anderson, p. 8.
- ¹¹ 42 U.S.C. § 4332(C).
- ¹² Environmental Defense Fund v. Corps of Engineers (Gilliam Dam), 325 F. Supp. 728, 1 E.A.R. 20141 (8th Cir. 1972).

- ¹³ J. Gordon Arbuckle et al., Environmental Law Handbook, ed. Robert Young (Washington D.C.: Government Institutes, Inc., 1976) pp. 65-67.

CHAPTER IV

THE EVOLUTION OF FOREST SERVICE MINERAL POLICY

Roughly 85 percent of the 187 million acres in the National Forest system are included under the provisions of the Mining Law of 1872. Moreover, a substantial portion of the National Forest lands have a potential for mineral discovery. This fact, in addition to our nation's constant demand for more minerals, has spurred prospecting and mining on these lands in recent years.¹

Public outcry about increased surface resource damage, along with the new federal direction provided in NEPA to "promote efforts to prevent or eliminate damage to the environment,"² persuaded the Forest Service to issue regulations governing prospecting and mining in the National Forests.³ The regulations were printed in the Federal Register⁴ in August, 1974, and in the Code of Federal Regulations (C.F.R.),⁵ but not before three years of heated debate between environmental groups and the mining industry. In addition, Congressional oversight hearings were held by the Subcommittee on Public Lands of the House Interior and Insular affairs Committee to examine the proposed regulations.⁶

The Forest Service bases its authority to issue such regulations on a provision of the Organic Act which states:

Nor shall anything herein prohibit any person from entering upon such National Forests for all

proper and lawful purposes, including prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations governing the National Forests.

The Secretary of Agriculture may make such rules and regulations and establish such services as will insure the objects of such forest reservations, namely, to regulate their occupancy and use to preserve the forests thereon from destruction.⁷

The regulations require that anyone entering the National Forest for the purpose of prospecting or mining must provide the local District Ranger with a notice of intent if surface resource damage is anticipated. If the District Ranger believes that the proposed activities will result in substantial resource disturbance, he can require the miner to submit an operating plan. Each plan must include a general description of the proposed operation, furnishing such relevant information as the location of roads to be built, type of machinery to be utilized, and reclamation measures to be taken upon termination of the project. The District Ranger may also request that a bond be paid commensurate with the anticipated restoration cost of the mining site.

The District Ranger must prepare an Environmental Analysis Report (EAR) for each operating plan submitted. An EAR is usually a brief, non-technical report that explores, in general terms, what impacts a proposed mining operation is likely to have on the environment. Depending

on what the EAR discloses, there are three courses of action available to the District Ranger:

- 1) The operating plan can be approved,
- 2) The operating plan can be conditionally approved, requiring certain provisions to be agreed upon by the miner before he can commence his operation, or
- 3) The operating plan can be disapproved pending the preparation of an environmental impact statement.

Nationwide, over 1,300 operating plans have been approved by the Forest Service since implementation of the mining regulations. Three times as many notices of intent have been received. However, only five EISs have been, or are presently being, written.⁸

Resource management objectives for the Forest Service have been clarified in recent years by two Acts of Congress. In 1960, Congress passed the Multiple Use--Sustained Yield Act,⁹ which requires the Forest Service to manage the surface resources of the National Forest for five main uses: range, watershed, fisheries, timber, and wildlife.

The principle of multiple use of resources was again established in the Federal Land Policy and Management Act of 1976.¹⁰ This Act defined "multiple use" as:

...the harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the combination of uses that will give the greatest economic return or greatest unit output.¹¹

The Act also calls on the Forest Service to prepare land-use plans for each National Forest, that will provide long-range management goals.

In summary, the Mining Law of 1872 grants miners with the right to search for and remove hard-rock minerals on more than 500 million acres of federally owned land. NEPA sets forth new federal goals for protecting the environment. It also requires each federal agency to prepare an EIS prior to initiating any action which would adversely affect the environment. The Multiple Use-Sustained Yield Act and the Federal Land Policy and Management Act require the Forest Service to manage the National Forests in a manner which is consistent with a multiple use philosophy.

The next section addresses the problems presently confronting the Forest Service because of inherent conflicts that exist between the Mining Law and NEPA and the other Congressional and administrative statutes discussed above.

FOOTNOTES

Chapter IV

- ¹ U.S. Forest Service, Mining in National Forests: Regulations to Protect Surface Resources, Current Information Report No. 14 (Washington D.C., U.S. Government Printing Office, January 1975) p. 1.
- ² 42 U.S.C. § 4321.
- ³ U.S. Forest Service, Mining in National Forests, pp. 1, 4.
- ⁴ 39 Fed. Reg. 31317-21 (1974).
- ⁵ 36 C.F.R. § 252 et seq.
- ⁶ The Congressional hearings on the proposed mining regulations were held March 7 and 8, 1974.
- ⁷ 16 U.S. C. §§ 478, 551.
- ⁸ Council on Environmental Quality, Hard Rock Mining on National Lands, by David Sheridan (Washington D.C.: U.S. Government Printing Office, 1977), p. 15.
- ⁹ 16 U.S.C. § 528 et seq.
- ¹⁰ 43 U.S.C. § 1701 et seq.
- ¹¹ 43 U.S.C. 1702.

CHAPTER V

CONFLICTS AND CONFUSION

The Mining Law of 1872 provides the mining industry with unique privileges not enjoyed by other commercial users of the National Forests. Lumber companies may harvest timber only in designated areas, and only after competitive bidding. Ranchers may graze livestock, but only after purchasing a permit. Moreover both of these uses of the National Forest are carefully managed by the Forest Service. However, the mining industry lacks such controls. A miner may go anywhere on the 143 million acres of National Forest land open to hard-rock mining and utilize almost any type of machinery to search for minerals. In addition, the discovery of minerals and filing of a mining claim are not prerequisites for access. The Forest Service Manual states:

Any person prospecting, locating, and developing mineral resources in National Forest lands under the 1872 Mining Law has a statutory right to access for these purposes. Such persons need not have located or have interests in mining claims to exercise that right.¹

Even in a portion of a National Forest having a relatively low potential for the discovery of minerals but a high value for other uses such as timber or wildlife a miner may engage in prospecting operations.

This lack of control over mining results in an unavoidable conflict between NEPA and the Mining Law. While a

primary goal of the former is to reduce or avoid damage to the environment, the sole purpose of the latter is to remove, as inexpensively as possible, minerals from public lands. The Mining Law makes no attempt to balance the nation's needs for minerals with the nation's need for a healthy environment.²

The Mining Law also interferes with the underlying principle of multiple use mandated by Congress in the Multiple Use--Sustained Yield Act and the Federal Land Policy and Management Act discussed in Chapter IV.³ Multiple use of public lands refers to the maximum contribution from all resources in such a manner that the public can be best served.⁴ The Mining Law, however, proposes only one use of the land wherever valuable minerals are found.⁵ In addition, the Mining Law places serious constraints on land-use planning efforts undertaken by the Forest Service because of the ever-present uncertainty of where mining activities will occur.⁶

The Multiple Surface Act of 1955 amended the Mining Law and provided the Forest Service with the authority to manage the surface resources on all unpatented claims within the National Forest system (see Chapter IV). Unfortunately, mining often excludes other uses of the land (Figures 2 and 3). Moreover, the Forest Service lacks the authority to use surface resource damage as justification



FIGURE 2. Ward Lode open-pit mine. The area presently disturbed is 20 acres. The developers anticipate considerable deepening and widening of the pit in the next several decades.



FIGURE 3. Storage site for Ward Development Corporation. The site is located one mile east of the mine on one of the corporation's 307 mining claims.

to control mining activities if such disturbance cannot be avoided.⁷

What constitutes unavoidable disturbance, however, is not easily assessed. An example illustrating this point is the Ward Lode open-pit mine located in the Lolo National Forest, approximately eighteen air miles southwest of Missoula, Montana. The Forest Service recognizes that utilizing methods other than open-pit mining would substantially reduce the surface resource damages (Figure 4).⁸ However, the owners of the mine have declared that, due to the unconsolidated nature of the materials overlying the ore body, alternative techniques are economically prohibitive.⁹ The Forest Service's position is that if they were to press the developers of the mine to use less destructive methods, a court would likely view this action as infringing on the miners' statutory rights.¹⁰ In a conversation concerning mining operations in general, the Forest Zone Mining Engineer for the Lolo National Forest stated that unless the economies between two mining techniques were very similar, and one method was clearly superior in reducing the damages inflicted to the environment, the Forest Service cannot dictate to a miner what method to use.¹¹

By adopting the mining regulations discussed in Chapter IV, an attempt has been made by the Forest Service to reduce mining-caused surface resource damage occurring in



FIGURE 4. Aerial view of the Ward Lode mine. The pit is at the top of the picture. The yellow truck is situated on the overburden. The Elk Meadows Road is at the bottom of the picture.

the National Forests. However, the regulations have come under attack by environmental groups and the mining industry, though for entirely different reasons. Furthermore, the Forest Service is not sure of the precise role it should play. While they are responsible for managing the surface resources, the Department of the Interior has the duty of enforcing the Mining Law.¹²

Environmentalists believe that the regulations are not very effective in preventing resource damage. Although the Forest Service may require an operating plan, and they may even prepare an EIS, the Forest Service cannot deny the miner his right to mine. In a speech to the American Mining Congress, John R. McGuire, former Chief of the Forest Service, stated that "the Mining Law does not permit us to refuse prospecting and mining for environmental reasons."¹³ Thus, it would appear that the primary purpose of the Forest Service in instigating the regulations is to determine the impacts which are likely to occur from a mining operation and to attempt to coerce the miner into working with them to minimize the surface resource damage.

Another complaint of the mining regulations is that the Forest Service reviews an operating plan separately instead of examining each plan in light of all other proposed or existing operations in the area.¹⁴ As a result of this policy, the cumulative effect of various prospecting

and mining operations is not considered.

The mining industry and its supporters in Congress have expressed doubt that the Forest Service had the statutory authority to instigate its mining regulations, particularly the provision requiring that, under certain conditions, an EIS be prepared prior to approval of an operating plan. Senator John Melcher of Montana, in a letter to the Chief of the Forest Service, said that he had serious reservations about the applicability of NEPA to hard-rock mining.¹⁵

There is administrative and judicial support that lend credibility to this skepticism. In a 1973 ruling before the Interior Board of Land Appeals (IBLA) it was held that the Department of the Interior need not prepare an EIS prior to issuing a mineral patent to a mining claim because processing such an application is not a discretionary act. The Board declared:

To the extent that the mining laws give to individuals the right to enter the public domain, to locate mining claims thereon, to discover minerals therein, and to extract and remove those minerals therefrom, all without prior approval of the United States, the development of a mining claim cannot be tort used into a "Federal action," major or minor or otherwise.¹⁶

In a later decision,¹⁷ the First Circuit Court held that the Secretary of Health, Education, and Welfare (HEW) did not violate NEPA by failing to write an EIS when he terminated a community hospital's status as a "provider of services" under the Medicare Act resulting from the hospital's

non-compliance with federal fire safety standards. The court's ruling was based on the finding that the Secretary of HEW was not intended by Congress to have discretion in such a matter and NEPA should not, therefore, apply to decertification. This same argument was again upheld in a recent case before the District Court in Delaware.¹⁸

These decisions seem to indicate that if approval of a miner's operating plan is not discretionary, then the Forest Service is not obligated to prepare an EIS.

Another line of reasoning that has been suggested to argue that the Forest Service may lack authority to write an EIS is based on the time frames required to prepare such a document. For example, personnel of the Forest Service are presently writing an EIS for the proposed expansion of the Ward Lode Mine. From the time the Forest Service receives a completed operating plan until the Council on Environmental Quality gives final approval to the EIS will require a minimum of sixteen months.¹⁹ It is possible that the span of time required for the EIS process would be viewed by a court as an unreasonable restriction of a miner's statutory rights guaranteed under the Mining Law of 1872.

To date, the legality and scope of the Forest Service's authority to issue the regulations have not been challenged. There are two reasons that can be attributed

to this absence of litigation. First, the Forest Service itself is unsure of its statutory authority to regulate hard-rock mining and has instructed its employees to exercise great care in administering the regulations. A 1975 addition to the Forest Service Manual cautioned administrators that "unreasonable demands made as a condition for approval of operating plans will hazard court challenges."²⁰ This is probably a major reason why the Forest Service has only prepared five EISs since instigating the new mining regulations. Secondly, miners will likely find it both less expensive and time consuming to abide by the Forest Service regulations rather than challenging them in administrative and judicial proceedings.²¹

FOOTNOTES

Chapter V

- ¹ Forest Service Manual, Section 2851.7.
- ² Council on Environmental Quality, Hard Rock Mining on National Lands, by David Sheridan (Washington D.C.: U.S. Government Printing Office, 1977) pp. 3, 11.
- ³ Ibid., at p. 27.
- ⁴ 16 U.S.C. § 531.
- ⁵ Council on Environmental Quality, Hard Rock Mining on National Lands, p. 27.
- ⁶ Letter from Jack Losensky, Interdisciplinary Planner, Lolo National Forest, Missoula, Montana, June 2, 1978.
- ⁷ Randy L. Parcel, "Federal, State and Local Regulation of Mining Exploration," Rocky Mountain Mineral Law Institute (New York: Mathew Bender and Company, 1975) Vol. 22, p. 411.
- ⁸ Interview with Ray Wallace, Forest Zone Mining Engineer, Lolo National Forest, Missoula, Montana, August 1, 1977.
- ⁹ Interview with Fred Ward, President of Ward Development Corporation, Missoula, Montana, August 17, 1977.
- ¹⁰ Interview with Ray Wallace, August 1, 1977.
- ¹¹ Interview with Ray Wallace, August 15, 1978.
- ¹² Bureau of Land Management, Staking a Mining Claim on Federal Lands, Information Bulletin No. 2-78 (Washington D.C.: U.S. Government Printing Office, 1978)
- ¹³ John R. McGuire, Chief of the Forest Service, in a speech to the American Mining Congress, September 28, 1976.

- 14 Council on Environmental Quality, Hard Rock Mining on National Lands, p. 19.
- 15 Letter from Congressman Melcher to John McGuire, Chief of the Forest Service, June 20, 1974.
- 16 United States v. Kosanke Sand Corp., 12 I.B.L.A. 282, G.F.S. (MIN) 79 (1973).
- 17 Milo Comm'y. Hosp. v. Weinberger, 525 F. 2d, 144, 8 E.R.C. 1588 (1st Circuit, 1975).
- 18 NAACP v. Wilmington Medical Center, 536 F. Supp. 1194, 1201 (D. Delaware, 1977).
- 19 Interview with Homer Bowles, Resource Forester, Lolo National Forest, Missoula, Montana, August 17, 1977.
- 20 Forest Service Manual, Section 2850.
- 21 Parcel, p. 411.

CHAPTER VI
THE MINING LAW OF 1872: PROPOSED CHANGES

Despite the changes that the Mining Law has undergone at the hands of Congress, the judiciary, and federal land management agencies, the pressure for further reform or even repeal has mounted in recent years. The former Director of the Bureau of Land Management spoke harshly of the Law when he remarked:

Repeal the unadministrable and environmentally devastating Mining Act of 1872 and place all "hard-rock" minerals under the Mineral Leasing Act of 1920 ...Why should the mining industry have any special right over and above anybody else...We are suggesting simply that they compete on an equal basis.¹

There have been a number of commissions, one as early as 1880, that have spoken for the need for reform of the 1872 law. The most recent and comprehensive analysis of federal policies concerning public lands was the prestigious Public Land Law Review Commission (PLLRC) held in 1970 under the Nixon administration.² In their report, the PLLRC stated, "The General Mining Law of 1872 has been abused, but even without the abuse, it has many deficiencies."³

The Commission recommended the following changes:

- 1) Require an exploration permit whenever equipment that would be damaging to the environment is used.
- 2) Permit the land management agencies to establish environmental safeguards for mineral development and mining.

- 3) Impose royalty charges on production of minerals.
- 4) Subject minerals to competitive bidding whenever competitive interests can be reasonably expected.
- 5) Permit the miner to obtain a patent only to the mineral deposit and such area as is necessary for production.⁴

However, the recommendations failed to attract substantial political support, with the exception of the larger mining companies. Smaller mining interests have had a history of opposing the changing of even so much as a comma in the old law, while other opponents apparently felt that the recommendations did not go far enough.⁵

In 1977, during the first session of the 95th Congress, three bills were introduced calling for either amendments to or repeal of the Mining Law. The bill which received the most early support was H.R. 5831.⁶ This bill was drafted by the American Mining Congress, the mining industry's trade association, and introduced into the House of Representatives by Phillip Ruppe of Michigan. It called for only minor revisions of the existing law. Among other things, the bill would have required a small royalty payment and would have required that a miner file a development plan with the Department of the Interior prior to conducting prospecting or mining operations.⁷ Critics complained that the bill would have granted more freedom to the mining industry than they already enjoy.⁸ Their

reasoning was based in part on the fact that under the proposed bill miners would no longer need to locate minerals prior to applying for a patent--one could be obtained by little more than filing a development plan with the Department of the Interior. The proposed legislation would also have granted the miner "exclusive right to possession and use of all surface resources within the claim's boundary lines..."⁹

During the same session of the 95th Congress many environmental interests backed a bill drafted by the Carter administration and introduced into the House of Representatives by Phillip Burton of California, as H.R. 9292¹⁰ and into the Senate by Lee Metcalf of Montana as S. 2133.¹¹ It called for the complete replacement of the Mining Law. The bill would have required a person to secure a license from the Department of the Interior prior to prospecting for minerals. The license would permit exploration only in designated areas and would necessitate payment of \$5.00 for each acre the prospector wished to utilize. Upon the discovery of minerals, and prior to their removal, the license holder would need to apply for a lease. In addition, the lessee would be required to make royalty payments of not less than two percent of the gross mineral value and an annual rental payment of not less than \$25.00 per acre.¹²

H.R. 9292 and H.R. 5831 were referred to the Committee

of Interior and Insular Affairs in the House of Representatives. Senate Bill 2133 was referred to the Committee on Energy and Natural Resources in the Senate. However, no action was taken on any of these bills during either session of the 95th Congress.

FOOTNOTES

Chapter VI

- ¹ Charles H. Stoddard, "Administration of the Public Lands," America's Public Lands: Politics, Economics, and Administration, ed. Harriet Nathan, Conference on the Public Land Law Review Commission Report, Institute of Government Studies, University of California, Berkeley, 1972, pp. 245, 289.
- ² 43 U.S.C. § 139 et seq.
- ³ "One Third of the Nation's Land: A Report to the President and to Congress," The Public Land Law Review Commission (Washington D.C.: U.S. Government Printing Office, June 1970), p. 124.
- ⁴ Ibid. at pp. 124-138.
- ⁵ Council on Environmental Quality, Hard Rock Mining on National Lands, by David Sheridan (Washington D.C.: U.S. Government Printing Office, 1978) p. 11.
- ⁶ U.S. Congress, House, A Bill to Establish a System for the Development of Mineral Resources on Public Lands of the United States, 95th Cong., 1st sess., 1977, H.R. 5831.
- ⁷ Ibid. at pp. 12, 42.
- ⁸ Brant Calkin and John McComb, note in David Sheridan's article, "Mining the Public Wealth: It's Time to Reform the Mining Law of 1872," Sierra (March-April 1978) p. 12.
- ⁹ H.R. 5831, pp. 13, 34.
- ¹⁰ U.S. Congress, House, A Bill to Reform the Mining Laws, and for Other Purposes, 95th Cong., 1st sess., 1977, H.R. 9292.
- ¹¹ U.S. Congress, Senate, A Bill to Reform the Mining Laws

and for Other Purposes, 95th Cong., 1st sess., 1977,
S. 2133.

¹² Ibid., at pp. 1, 9, 17, 18, 19.

CHAPTER VII

CONCLUSION

The Mining Law of 1872 has served a useful purpose. It has provided incentive to private industry to search for and remove needed minerals from public lands. But the Law is no longer attuned with the national goals of stopping unwarranted environmental degradation as outlined in NEPA and of managing the National Forests for a variety of beneficial uses as proposed by the Multiple Use--Sustained Yield Act and the Federal Land Policy Act.

Litigation is needed to provide clarification of NEPA's role in regulating hard-rock mining. The Forest Service presently requires an EIS prior to permitting a mining operation to take place on the National Forests if that operation is to cause significant environmental impacts. However, critics of the regulations believe that the Forest Service may lack the authority to write an EIS. They base their belief on the argument that approval of a miner's operating plan is not a discretionary action and therefore should not require an EIS.

There is considerable public support to place hard-rock mining under a leasing system similar to how oil, gas, and coal are presently managed. Only when mining is treated as just one of many valid uses will the National Forests be

managed in a manner that is consistent with the multiple use philosophy mandated by Congress.

BIBLIOGRAPHY

Anderson, Frederick R., "The National Environmental Policy Act: How it is Working: How it Should Work." Environmental Law Reporter, January, 1974.

Anderson, Robert C., "Federal Mineral Policy: The General Mining Law of 1872." Natural Resource Journal 16 (July 1976).

Arbuckle, J. Gordon; Michael, James A.; Miller, Marshall Lee; and Sullivan, F.B., Environmental Law Handbook. Washington D.C.: Government Institutes, Inc., 1976.

Bowles, Homer, Resource Forester, Lolo National Forest, Missoula, Montana. Interview, August 17, 1977.

Burchell, Robert W. and Listokin, David, The Environmental Impact Handbook. New Brunswick: Rutgers University, 1975.

Bureau of Land Management, "Staking a Claim on Federal Lands." Information Bulletin No. 2-78. Washington D.C.: U.S. Government Printing Office, 1978.

Calkin, Brant and McComb, John, Note in David Sheridan's article, "Mining Public Wealth: It's Time to Reform the Mining Law of 1872." Sierra, March-April 1978.

Council on Environmental Quality. Hard Rock Mining on National Lands, by David Sheridan. Washington, D.C.: U.S. Government Printing Office, 1977.

Ditton, Robert B., "NEPA: Buckling Down." Environmental Impact Analysis: Philosophy and Methods. Edited by Robert B. Ditton and Thomas I. Goodale. Green Bay: University of Wisconsin Press, 1972.

Forest Service Manual. Section 2800 et seq.

Hildebrand, James L., "Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research." Columbia Law Review 70 (April 1970).

Losensky, Jack, Interdisciplinary Planner, Lolo National Forest, Missoula, Montana. Letter, June 2, 1978.

McGuire, John, Chief of the Forest Service. Speech to the American Mining Congress, September 28, 1976.

Melcher, John, U.S. Congressman. Letter to John McGuire, Chief of the Forest Service, June 20, 1974.

"One Third of the Nation's Land: A Report to the President and to Congress." The Public Land Law Review Commission. Washington D.C.: U.S. Government Printing Office, June, 1970.

Parcel, Randy L., "Federal, State and Local Regulation of Mining Exploration." Rocky Mountain Mineral Law Institute. Vol. 22. New York: Mathew Bender and Company, 1975.

Sax, Joseph, Defending the Environment: A Strategy for Citizen Action. New York: Knopf, 1971.

Stoddard, Charles H., "Administration of the Public Lands." America's Public Lands: Politics, Economics, and Administration. Edited by Harriet Nathan. Conference on the Public Land Law Review Commission Report. Institute of Government Studies. Berkeley: University of California, 1972.

United States Congress, Senate. Revision of the Mining Law of 1872. S. Doc. 95-11. 95th Cong., 1st sess., 1977.

United States Forest Service. Mining in National Forests: Regulations to Protect Surface Resources. Current Information Report No. 14. Washington, D.C.: U.S. Government Printing Office, January 1974.

Wallace, Ray, Forest Zone Mining Engineer, Lolo National Forest, Missoula, Montana. Interviews, August 1, 1977 and August 15, 1978.

Ward, Fred, President of Ward Development Corporation, Missoula, Montana. Interview, August 17, 1977.

Court Cases

Castle v. Womble, 19 L.D. 455 (1894).

United States v. Coleman, 390 U.S. 599 (1968).

Calvert Cliff's Coordinating Committee v. Atomic Energy Commission, 449 F. 2d 1109, 1 E.L.P. 20346 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972).

Environmental Defense Fund v. Corps of Engineers (Gilliam Dam), 325 F. Supp. 728, 1 E.L.R. 20141 (1st Cir. 1975).

United States v. Kosanke Sand Corp., 12 I.B.L.A. 282, GES (MIN) 79 (1973).

Milo Comm'y. Hospital v. Weinberger, 525 F. 2d 144, 8 E.R.C. 1588 (1st Cir. 1975).

NAACP v. Wilmington Medical Center, 536 F. Supp. 1194 (D. Delaware 1977).

Statutes

Mining Law of 1872. 30 U.S.C. § 22 et seq.

National Environmental Policy Act of 1969. 42 U.S.C. § 43 et seq.

Multiple Surface Use Act of 1955. 30 U.S.C. § 601 et seq.

Mineral Lands Leasing Act of 1920. 30 U.S.C. § 48 et seq.

Organic Act of 1897. 16 U.S.C. § 471 et seq.

Multiple Use--Sustained Yield Act of 1960. 16 U.S.C. § 528 et seq.

Federal Land Policy and Management Act of 1976. 43 U.S.C. § 1701 et seq.

Public Land Law Review Commission. 43 U.S.C. § 1391 et seq. (1969).

National Forests Surface Use Under United States Mining Laws. 39 Fed. Reg. 31317-21 (1974) and 36 C.F.R. § 252 et seq.

Proposed Legislation

United States Congress, House. A Bill to Establish a System for the Development of Mineral Resources on Public Lands of the United States. 95th Cong., 1st sess., 1977, H.R. 5831.

United States Congress, House. A Bill to Reform the Mining Law and for Other Purposes. 95th Cong., 1st sess., 1977, H.R. 9292.

United States Congress, Senate. A Bill to Reform the Mining Law and for Other Purposes. 95th Cong., 1st sess., 1977, S. 2133.